

BEFORE THE PRESIDING DISCIPLINARY JUDGE

**IN THE MATTER OF A MEMBER OF THE
STATE BAR OF ARIZONA,**

**MICHAEL S. DEFINE,
Bar No. 020425**

Respondent.

PDJ 2023-9031

FINAL JUDGMENT AND ORDER

(State Bar Nos. 22-1518, 22-1766)

FILED SEPTEMBER 22, 2023

The hearing panel rendered its Decision and Order Imposing Sanctions on August 25, 2023. No timely appeal was filed.

IT IS THEREFORE ORDERED that **MICHAEL S. DEFINE, Bar No. 020425**, is suspended from the practice of law in Arizona for six months and one day, effective September 25, 2023, for his conduct in violation of the Arizona Rules of Professional Conduct.

IT IS FURTHER ORDERED that Respondent comply with the requirements relating to notification of clients and others and provide and/or file all notices and affidavits required by Rule 72, Ariz. R. Sup. Ct.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$4,000.00 within 30 days. There are no costs or expenses incurred by the office of the Presiding Disciplinary Judge in these proceedings.

DATED this 22nd day of September, 2023.

Margaret H. Downie
Margaret H. Downie
Presiding Disciplinary Judge

Copy of the foregoing emailed
this 22nd day of September, 2023, to:

Hunter F. Perlmeter
LRO@staff.azbar.org

Stanley R. Lerner
stan@lernerpc.com

by: SHunt

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**DECISION AND ORDER
IMPOSING SANCTIONS**

(State Bar Nos. 22-1518, 22-1766)

FILED August 25, 2023

The State Bar of Arizona filed a two-count complaint against Respondent Michael S. DeFine on April 28, 2023. An evidentiary hearing was held on August 16, 2023, before a hearing panel comprised of Presiding Disciplinary Judge Margaret H. Downie, attorney member Teri Rowe, and public member Howard Weiske. The State Bar was represented by Senior Bar Counsel Hunter F. Perlmeter. Mr. DeFine was present with his counsel, Stanley R. Lerner. State Bar exhibits 1-34 were admitted into evidence, and the following individuals testified:

- Michael S. DeFine
- Ranita Rozenberg

Having considered the record before it, the hearing panel issues the following findings of fact, conclusions of law, and sanction in the form of a six-month-and-one day suspension from the practice of law in Arizona.

FINDINGS OF FACT

1. Mr. DeFine was admitted to the State Bar of Arizona on October 23, 2000.

Count One

2. Ranita Rozenberg retained Mr. DeFine in 2019 to represent her regarding a personal injury claim arising out of an automobile accident that occurred on April 28, 2019.

3. Mr. DeFine filed a civil complaint in Maricopa County Superior Court on behalf of Ms. Rozenberg on April 28, 2021 -- the last day to file suit under the applicable statute of limitations. The named defendants were William Gannon and Duane Wildes. At the time of the collision, Ms. Rozenberg was a passenger in Mr. Wildes's vehicle.

4. Ms. Rozenberg is employed as a paralegal, and she regularly monitored the superior court's online docket for her case.

5. The superior court issued an order on July 7, 2021, captioned, "**NOTICE OF INTENT TO DISMISS FOR LACK OF SERVICE.**" The order set a July 27, 2021, deadline for completing service of process and stated that the case would be dismissed without prejudice if service had not been effectuated by that date.

6. On July 27, 2021 -- the date set for dismissal of Ms. Rozenberg's case -- Mr. DeFine filed a Motion for Alternative Service, seeking authorization to effectuate service on the defendants by publication. The motion did not request an extension of time to complete service. In an order filed August 24, 2021, the superior court authorized service by publication but did not extend the previously imposed deadline for service.

7. On October 27, 2021, the superior court dismissed Ms. Rozenberg's case without prejudice due to the lack of timely service of process.

8. On October 27, 2021, Ms. Rozenberg emailed Mr. DeFine, stating:

What's the status of my case? According to docket, things have not moved and possibly dismissed. I am not able to retrieve the [minute entry] that was docketed today.

Mr. DeFine responded to Ms. Rozenberg as follows:

I received that notification as well today but that was consistent with the notice of dismissal at the end of July. We filed for the alternative service motion which was granted and so I believe that the dismissal entry was done automatically. I am putting in a motion to set aside that dismissal because that dismissal because [sic] it is completely inconsistent with the court's order but the court's order for service by publication. Moreover, we recently learned that 1 it's not a learned [sic] that 1 of the defendants insurance company is except insurance [sic] company is accepting service. So I will inform the court of that as well. This is not a procedural mistake but a clerical error it's clerical [sic] error from the court. I will rectify it immediately.

Contrary to Mr. DeFine's representations to his client, the dismissal order was not a "clerical error" or "completely inconsistent with the court's order." As noted *supra*, Mr. DeFine did not request or receive an extension of time to complete service beyond the court-imposed deadline of July 27, 2021.

9. On November 1, 2021, Ms. Rozenberg emailed Mr. DeFine, asking: "[W]hen do you plan on filing this motion." Mr. DeFine responded: "It will be filed tomorrow."

10. On November 5, 2021, Ms. Rozenberg emailed Mr. DeFine, asking if the motion had been filed. Mr. DeFine responded the same day, stating, "It was filed and we should [sic] have the Order Monday or Tuesday." This statement was false, and Mr. DeFine knew it.

11. On November 29, 2021, Ms. Rozenberg again emailed Mr. DeFine, stating:

I am growing increasingly frustrated as my case has been dismissed for over a month due to lack of service of the complaint that was filed late April 2021. I have email correspondence from you stating that a motion has been filed to remedy the dismissal. This motion does not exist on the docket. The fact that we are even in this situation is completely ridiculous. Since you waited to the very last day to file my complaint (due to statute of limitations) we will not be able to refile. This is unacceptable representation and is malpractice.

Mr. DeFine responded to Ms. Rozenberg, stating, in pertinent part:

The delay in a being [sic] in the docket is because of the holiday. I expect that it will show up on the docket by tomorrow. One issue that came up with 1 of the defendants is that the publication that I filed with came back 2 weeks later with an invoice saying that the publication was gonna cost over \$1500 when they told me it would be 340. I canceled that publication and went build [sic] that publication and went with the record reporter who is a lot less but still requires time to complete the publication. The other defendant has the waiver of service and is awaiting at the decision of this court on the motion.

I'm requesting from you just a little more time for the court to come to their obvious decision based on the circumstances. This is always been [sic] a case where both defendants are going to be fighting each other. The totality of the circumstances is not legal malpractice. All reasonable efforts have been, and always have been, made. *I anticipate a ruling by the end of this week at the latest so please bear with the process until then.*

The italicized statements were false, and Mr. DeFine knew they were false. He had not filed a motion, there was no delay in docketing the non-existent motion, and there was no pending court ruling on the non-existent motion.

12. On December 16, 2021, Mr. DeFine emailed Ms. Rozenberg, stating: "No official ruling on the motion probably until next week." Mr. DeFine knew this statement was false. There was no motion awaiting "official ruling."

13. On January 26, 2022, Mr. DeFine emailed Ms. Rozenberg, stating, *inter alia*: “I am awaiting the order of the court to proceed.” This was a knowing false statement, as no motion had been filed that would result in a court order.

14. On April 1, 2022, David Keys-Nunes -- counsel for one of the defendants -- emailed Mr. DeFine and Mr. DeFine’s paralegal, stating, in pertinent part:

This case is still dismissed as I read the docket. 10/27/21 minute entry issued dismissing the case for lack of service. Any answer to the case is improper until it is reinstated.

No one responded to this email, and on April 7, 2022, Mr. Keys-Nunes forwarded the same email message again to Mr. DeFine, stating, “Following up on the email below.”

15. On May 10, 2022, Ms. Rozenberg emailed Mr. DeFine, inquiring about any court action and about pursuing a default judgment against Mr. Gammon because he had not filed an answer. After receiving no response, Ms. Rozenberg sent the same message to Mr. DeFine again on June 13, 2022, stating, “Once again, following [up] on the below.”

16. Having received no response to his previous communications, defense counsel Key-Nunes sent the following email to Mr. DeFine on June 16, 2022:

This case has been in a dismissal posture since the Court’s October 23, 2021, order. We sent several emails over six months pointing out this issue: 10/27/21, 11/11/21, 4/1/22, and 4/7/22. In those emails, we explained the defect and the legal barrier to our client filing an Answer. The last day for reinstatement was April 25, 2022. I’ve checked the docket and no reinstatement was requested nor has the court ordered the case reinstated. It is our position the matter is now time barred. We will be closing our file.

17. Mr. DeFine did not file a motion to reinstate Ms. Rozenberg’s case until January 17, 2023 – approximately six months after Ms. Rozenberg filed her bar charge

against him. Over defendants' objections, the superior court granted the motion and reinstated the case. Both defendants filed notices of appeal from the reinstatement order.

18. After the case was reinstated, but while the notices of appeal were pending, a settlement was reached. Ms. Rozenberg testified at the disciplinary hearing that she accepted less by way of settlement than had previously been offered because she was concerned about the possibility of a reversal on appeal.

19. Ms. Rozenberg filed a bar charge against Mr. DeFine in July of 2022. By letter dated July 20, 2022, Mr. DeFine was advised of the charge and directed to submit a written response addressing ER 1.3, ER 1.4, ER 3.2, and ER 8.4(c) by August 9, 2022. Mr. DeFine was reminded of his duty to cooperate with the State Bar's investigation pursuant to ER 8.1(b) and Rule 54(d), Ariz. R. Sup. Ct.

20. After receiving no response from Mr. DeFine, bar counsel sent a second letter, dated August 16, 2022, directing him to respond to Ms. Rozenberg's charge within 10 days. Mr. DeFine was again reminded of the duty to cooperate and cautioned that "failure to cooperate with a disciplinary investigation is grounds, in itself, for discipline."

21. The State Bar heard nothing from Mr. DeFine for several months. On January 13, 2023, he emailed bar counsel, stating:

I was hoping to get until Monday for my response. On December 28 and January 5 I was diagnosed with Covid and I took a follow-up yesterday. The lab is 48-72 hours for the response time. I would prefer to not go to my office, which I have not been [sic] the 28th of course, while people are there. Regardless of the test results I will go to my office for the file this weekend when the office is empty.

Bar counsel responded the same day, stating: “Michael, as you’re aware, the response is already months late; but if it’s here Monday, I will read it and incorporate it into my investigation.”

22. Mr. DeFine finally submitted a response to Ms. Rozenberg’s bar charge on January 17, 2023. He included the following statements regarding the alleged violation of ER 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation):

This allegation is especially troubling to me in that none of these descriptions, which require an element of malicious intent, existed. . . . Any misunderstanding of the status of the case pre-Bar complaint was not based at all on any of these characteristics described in this Rule. I inquired with and had communication with opposing counsel regarding the service issue. There was no fraud or deceit perpetrated. The reference to my client to intending an inquiry with the Court regarding the service issue but instead communicating with opposing counsel on the subject could be considered a misrepresentation, but it was with the intention of working with opposing counsel without involving the court’s schedule.

I take full responsibility for any misunderstanding, misinterpretation or unintended delay in this matter and have taken efforts to remedy the situation. . . . Through unforeseen circumstances, misinterpreted avowals and unexpected delays I will be the first to admit that this case is a personal embarrassment to me because of the frustrating effect it has had on my client.

23. In January of 2023, bar counsel asked Mr. DeFine to provide a supplemental response to the bar charge that specifically addressed ER 8.4(c) and the alleged misrepresentations to Ms. Rozenberg. Mr. DeFine did so, denying “the harsh and damaging accusation of dishonesty” and characterizing his client communications as perhaps suffering from a “[l]ack of clarity.”

24. Mr. DeFine's misrepresentations to Ms. Rozenberg were not "misinterpreted avowals" or misunderstandings based on a "lack of clarity." They were lies.

Count Two

25. Mr. DeFine utilized a representation agreement in a probate matter that failed to include language required by ER 1.5(d)(3). Specifically, the representation agreement omitted language stating that, "the client may . . . discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee . . ."

26. The State Bar does not allege, and there is no evidence that the client in Count Two was harmed by the technical violation of ER 1.5(d)(3).

27. Mr. DeFine failed to timely comply with the State Bar's requests for a copy of the accounting given to the client in the probate matter. Intake counsel requested the accounting on August 22, 2022, asking that it be submitted by August 29, 2022. When it was not provided, intake counsel again contacted Mr. DeFine on September 15, 2022, asking him again for the accounting. Mr. DeFine did not comply until after receiving notice that intake counsel had referred the matter to litigation counsel for a screening investigation.

CONCLUSIONS OF LAW

1. As to Count One, the State Bar proved by clear and convincing evidence that Mr. DeFine violated ER 1.3, ER 1.4, ER 3.2, ER 8.4(c), and ER 8.4(d).

2. As to Count Two, the State Bar proved by clear and convincing evidence that Mr. DeFine violated ER 1.5(d)(3) and Rule 54(d), Ariz. R. Sup. Ct.

SANCTION

The State Bar requests a long-term suspension that will require Mr. DeFine to go through reinstatement proceedings and demonstrate, *inter alia*, rehabilitation, pursuant to Rule 65, Ariz. R. Sup. Ct. Mr. DeFine's counsel suggests a six-month suspension, followed by terms of probation.

Sanctions imposed against lawyers are determined in accordance with the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("ABA Standards"). Rule 58(k), Ariz. R. Sup. Ct. In fashioning an appropriate sanction, the hearing panel considers: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. "We do not consider the nature of the lawyer's practice, the effect on the lawyer's livelihood, or the level of pain inflicted [on the lawyer] when determining the appropriate sanction." *In re Scholl*, 200 Ariz. 222, 224 (2001); *see also In re Shannon*, 179 Ariz. 52, 71 (1994) (effect of disciplinary sanctions on a respondent lawyer's practice and livelihood is not a mitigating factor).

Mr. DeFine violated ethical duties owed to his clients, the legal system, and the profession. His conduct in Count Two was negligent and did not cause demonstrable harm. As to Count One, however, Mr. DeFine knowingly and repeatedly lied to his client over an extended period of time. He was also negligent in handling Ms. Rozenberg's matter and in communicating with her and opposing counsel. Ms. Rozenberg suffered both actual and potential harm. She testified that she retained Mr. DeFine to "make a stressful situation less so," but his conduct instead created significant additional stress.

Additionally, her financial recovery was delayed, and she ultimately settled for less than she had been offered earlier in the case due to the pendency of appeals that, she feared, might result in her receiving nothing.

Intentional or knowing conduct is sanctioned more severely than negligent conduct. *In re White-Steiner*, 219 Ariz. 323, 325 (2009). “When an attorney faces discipline for multiple charges of misconduct, the most serious charge serves as the baseline for the punishment. We assign the less serious charges aggravating weight.” *In re Moak*, 205 Ariz. 351, 353 (2003). Here, the most serious misconduct consists of Mr. DeFine’s dishonesty in Count One. *Cf. Atty Grievance Comm’n of Md. v. Wingerter*, 929 A.2d 47, 60 (Md. App. 2007) (“Unlike matters relating to competency, diligence and the like, intentional dishonest conduct is closely entwined with the most important matters of basic character to such a degree as to make intentional dishonest conduct by a lawyer almost beyond excuse.”). We assign aggravating weight to the violations in Count Two.

ABA Standard 4.61 states that disbarment “is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client.” ABA Standard 4.62 provides that suspension “is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.” The primary difference in these standards is the extent of harm suffered or potentially suffered. Without minimizing the harm to Ms. Rozenberg (and the harm accruing to the legal profession generally when attorneys act dishonestly), it does not necessarily rise to the level of “serious injury.” As such, the hearing panel relies on Standard 4.62 in determining the presumptive sanction.

The hearing panel next considers applicable aggravating and mitigating factors – both of which must be supported by “reasonable evidence.” *In re Abrams*, 227 Ariz. 248, 252 (2011).

The record supports the following aggravating factors:

- Prior disciplinary offenses. Mr. DeFine previously received an admonition and was placed on probation for entering into a business transaction with a client without complying with the requirements of ER 1.8(a).
- Dishonest or selfish motive. Mr. DeFine repeatedly lied to Ms. Rozenberg in an attempt to conceal his errors and omissions. “Attorney candor and honesty form the bulwark of our judicial system. *In re Ireland*, 146 Ariz. 340, 343 (1985); *see also In re Wines*, 135 Ariz. 203, 208 (1983) (“The administration of justice under our adversary system largely depends upon the public’s ability to rely on the honesty of attorneys who are placed in a position of being called upon to conduct the affairs of others both in and out of court.”); *Iowa Supreme Ct. Atty Disciplinary Bd. v. Bieber*, 824 N.W.2d 514, 523 (Iowa 2012) (“Fundamental honesty is the baseline and mandatory requirement to serve in the legal profession. The whole structure of ethical standards is derived from the paramount need for lawyers to be trustworthy. The court system and the public we serve are damaged when our officers play fast and loose with the truth.”).

- A pattern of misconduct. Mr. DeFine's acts of dishonesty were numerous and extended over a course of months.
- Multiple offenses. Mr. DeFine's misconduct included lack of diligence, lack of adequate communication, failure to expedite litigation, dishonesty, failure to cooperate with the State Bar, and a technical violation of the ethical rules relating to representation agreements.
- Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. Mr. DeFine repeatedly failed to cooperate with the State Bar's requests for information. Additionally, in the formal proceedings, despite express directives included in a case management order issued June 13, 2023, Mr. DeFine refused to cooperate in the preparation and submission of a joint prehearing statement. During the final hearing management conference, he attempted to blame the State Bar for his failure to comply, but the record reflects that, consistent with the June 13 order, the State Bar timely sent Mr. DeFine its portion of the joint prehearing statement and attempted to gain his cooperation. Due to Mr. DeFine's refusal to cooperate, the State Bar was forced to file a unilateral prehearing statement. "Failure to cooperate with disciplinary authorities is a significant aggravating factor." *In re Pappas*, 159 Ariz. 516, 527 (1988); *see also In re Galusha*, 164 Ariz. 503, 505 (1990) (failure to cooperate with bar counsel and respond to requests for information

“demonstrates a disregard for the Rules of Professional Conduct and borders on contempt for the legal system.”).

- Refusal to acknowledge wrongful nature of conduct. Throughout the screening process, Mr. DeFine steadfastly denied making any misrepresentations to his client. During the disciplinary hearing, he at times acknowledged lying to Ms. Rozenberg. On other occasions, though, he attempted to defend his misrepresentations with convoluted explanations that the hearing panel found both incredible and inconsistent with acceptance of responsibility.
- Substantial experience in the practice of law. Mr. DeFine was admitted to the State Bar more than 22 years ago.

Mr. DeFine established one mitigating factor by reasonable evidence: personal or emotional problems. A sensitive family situation came to Mr. DeFine’s attention in late 2021. Mr. DeFine’s testimony about this issue was placed under seal, and he was permitted to testify over the State Bar’s objection that the subject matter had only been disclosed immediately before the hearing began. But even assuming that this situation distracted Mr. DeFine from his professional duties for a period of time in early 2022, it has no causal nexus to the most serious misconduct – i.e., the dishonesty toward Ms. Rozenberg.

The seven aggravating factors far outweigh the lone mitigating factor, meaning either a step up from the presumptive sanction of suspension is appropriate or a relatively

lengthy suspension should be imposed. The hearing panel deems a long-term suspension more appropriate and concurs with the State Bar that a showing of rehabilitation is necessary before Mr. DeFine may once again practice law in Arizona.

CONCLUSION

Based on the foregoing, the hearing panel orders:

1. Mr. DeFine is suspended from the practice of law in Arizona for a period of six months and one day, effective 30 days from the date of this report. Terms of probation will be considered at the time of reinstatement.
2. Mr. DeFine shall pay the State Bar's costs in these proceedings.

A final judgment and order will issue at a later date.

DATED this 25th day of August, 2023.

/s/ signature on file
Margaret H. Downie, Presiding Disciplinary Judge

/s/ signature on file
Teri Rowe, Attorney Member

/s/ signature on file
Howard Weiske, Public Member

Copy of the foregoing e-mailed
this 25th day of August, 2023, to:

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by: JJones